Supreme Court, U. S.
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IN THE
Supreme Court of the United States
October Term, 1976

No. 76-870

MINNESOTA PUBLIC INTEREST RESEARCH GROUP,

Petitioner,

vs.

SECRETARY OF AGRICULTURE; JOHN V. McGUIRE, individually, and as Chief, United States Forest Service; JAY CRAVENS, individually, and as Regional Forester; HAROLD ANDERSON, individually, and as Supervisor, Superior National Forest; CONSOLIDATED PAPERS, INC.; THE NORTHWEST PAPER COMPANY; NORTHERN FOREST PRODUCTS, LTD.; KAINZ LOGGING COMPANY; EMIL ABRAMSON; BOISE CASCADE CORPORATION; and SIERRA CLUB,

Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Eighth Circuit

BRIEF FOR RESPONDENTS POTLATCH CORPORATION, NORTHERN WOOD PRESERVERS, LTD., AND BOISE CASCADE CORPORATION IN OPPOSITION

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I.

OPINIONS BELOW

The opinions delivered by the Courts below in the earlier stage of the litigation are reported at:

358 F. Supp. 584, 5 ERC 1251 (D. Minn. 1973)
498 F. 2d 1314, 6 ERC 1694 (8th Cir. 1974) (en banc)

Opinion delivered by the Courts below in the current stage of litigation are reported at:

401 F. Supp. 1276 (D. Minn. 1975)
541 F. 2d 1292, 9 ERC 1220 (8th Cir. 1976) (en banc)

II.

JURISDICTION

The grounds on which the jurisdiction of this Court is invoked are adequately stated in the petition.

III.

QUESTIONS PRESENTED

1. Whether the U.S. Forest Service acted arbitrarily in adopting an overall Management Plan for the BWCA which provides for, among other things, the completion of logging operations on six separate and distinct, existing, specifically located, and partially completed timber sales, but which leaves to future determination the detailed criteria for the making of future timber sales.

2. Whether the Court of Appeals correctly interpreted the Wilderness Act of 1964 as not prohibiting the logging of virgin timber in the Portal Zone of the BWCA.

IV.

STATUTORY PROVISIONS INVOLVED

Section 4 (d) (5) of the *Wilderness Act of 1964*, 16 U.S.C. §1133 (d) (5), 78 Stat. 895 (1964)
National Environmental Policy Act, 42 U.S.C. §§4321-4347, 83 Stat. 852 (1969)
Special Regulations for the Boundary Waters Canoe Area, 36 C.F.R. §293.16 (1976)

V.

STATEMENT OF THE CASE

1. History of the Litigation

In late 1972, Petitioner brought suit under the National Environmental Policy Act (NEPA), 16 U.S.C., §§4321 *et seq.*, seeking to enjoin logging in the Boundary Waters Canoe Area (BWCA) of northeastern Minnesota. Named as defendants were officials of the U.S. Forest Service, and private companies holding contracts, generally referred to as "timber sales", for the harvesting of timber in the BWCA.

On February 2, 1973, the District Court enjoined logging pending the completion by the Forest Service of its new Management Plan for the BWCA, and accompanying environmental impact statement (EIS). The District Court held that, although all of the timber sales had been made prior to the effective date of NEPA, continued administra-

tion of these sales by the Forest Service constituted major federal action requiring an EIS. The opinion which the District Judge filed subsequently is found in the Appendix at A-14 to A-96, and is reported at 358 F. Supp. 584 (D. Minn. 1973).

The U.S. Court of Appeals for the Eighth Circuit affirmed in an *en banc* decision, three judges dissenting. That decision is found in the Appendix at A-97 to A-122, and is reported at 498 F. 2d 1314 (8th Cir. 1974).

Later in 1974, the Forest Service issued its new Management Plan for the BWCA, with accompanying EIS. Petitioner and the Sierra Club promptly renewed the litigation, contending that the Wilderness Act of 1964, 16 U.S.C. §§1131 *et seq.*, prohibited commercial logging in the virgin forest areas of the BWCA, and further that the Management Plan and EIS were procedurally and substantively inadequate under NEPA.

The District Court issued a preliminary injunction, and after a lengthy trial, issued a permanent injunction against logging in the virgin forest areas of the BWCA. The District Court held that the Wilderness Act prohibited such logging, and further that the Forest Service's EIS was inadequate under NEPA. The District Court's decision is found in the Appendix at A-123 to A-223, and is reported at 401 F. Supp. 1276 (D. Minn. 1975).

The Court of Appeals reversed in a unanimous *en banc* decision, holding that the Wilderness Act did not prohibit commercial logging in the BWCA, and that the EIS was sufficient under NEPA. That decision is found in the Appendix at A-224 to A-264, and is reported at 541 F. 2d 1292 (8th Cir. 1976).

2. The Area and its Management

The Boundary Waters Canoe Area (BWCA) is located along the Canadian border in northeastern Minnesota. The BWCA is approximately 1,030,000 acres in size, and contains approximately 501,000 acres of virgin forest as that term has been used in this litigation. The BWCA is part of the Superior National Forest, and as such is administered by the U.S. Forest Service.

As its name implies, the Boundary Waters Canoe Area is primarily a canoe recreation area. Some 94 percent of the persons coming to the BWCA visit it for water recreation purposes.[1]

The BWCA is divided into two zones under regulations issued by the Secretary of Agriculture.[2] The Interior Zone, sometimes referred to as the "no-cut" zone consists of approximately 618,000 acres, 354,000 acres of which are virgin forest. It is the heart of the BWCA; it contains over 90 percent of the lake surface of the BWCA, and is the area which receives primary recreation usage.

The other zone is the Portal Zone. As the name implies, the Portal Zone is the entry zone through which persons pass to reach the Interior Zone. The Portal Zone which is at the perimeter of the BWCA, consists of approximately 412,000 acres, of which 147,000 acres are virgin forest.[3]

Commercial harvesting of virgin timber, in the "back country" areas away from the lakes and streams[4], has

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[1]Environmental Impact Statement (EIS), pages 16-17. The EIS is Government Exhibit 47.

[2]36 C.F.R. § 293.16 (1976).

[3]District Court opinion of August 13, 1975, Appendix at A-132, 401 F. Supp. at 1285; 1976 Court of Appeals opinion, Appendix at A-227, 541 F.2d at 1295.

[4]The Shipstead-Newton-Nolan Act of 1930, 16 U.S.C. § 577-577b, prohibits logging within 400 feet of the shoreline. By administrative direction, the Forest Service prohibits logging to the "military crest" which is the highest point which can be seen from the surface of the water.

been an historic use of the Portal Zone. In its 1976 decision, the Court of Appeals discussed the history of logging in the BWCA thus:

> Commercial harvesting of virgin timber has historically been a permissible use within the Portal Zone of the BWCA. This logging has been sanctioned by both congressional and administrative authority. During most of this century, the BWCA has been managed under a policy of multiple use forest management. (Appendix at A-256; 541 F. 2d at 1308).

The regulations of the Secretary of Agriculture establishing the two zones were made pursuant to the so-called "BWCA special provision" found in Section 4(d)(5) of the Wilderness Act of 1964, 16 U.S.C. §1133(d)(5). That Section provides in material part as follows:

> Other provisions of this chapter to the contrary notwithstanding, the management of the Boundary Waters Canoe Area, . . . shall be in accordance with regulations established by the Secretary of Agriculture in accordance with the general purpose of maintaining, without unnecessary restrictions on other uses, *including that of timber,* the primitive character of the area, particularly in the vicinity of lakes, streams, and portages . . . (emphasis supplied)

The Court of Appeals held that this provision did not prohibit logging in the Portal Zone of the BWCA, stating:

> The administrative history of the BWCA and the legislative history of the Wilderness Act conclusively show that logging was to continue as a permissible use within the BWCA's Portal Zone under the Act. (Appendix at A-231; 541 F. 2d at 1297).

The administrative history of the BWCA and the legislative history of the Wilderness Act are detailed in an Appendix to the Court of Appeals decision. Appendix at A-256 to A-264; 541 F.2d at 1308-1311.

3. The Existing Timber Sales

At present, there are six timber sales in effect in the BWCA. All six sales were made prior to January 1, 1970, the effective date of the National Environmental Policy Act (NEPA). These timber sales are held by Boise Cascade Corporation, Potlatch Corporation[5], and North-Wood Preserves, Ltd.[6] under contracts with the U.S. Forest Service.

These are separate and distinct timber sales, each of which is confined to a specifically prescribed area. The network of logging roads is already partially in place on these sales, and logging operations have been partially completed on each. All six were active timber sales until enjoined by the District Court in 1973.

The total area remaining to be logged on these six existing timber sales is approximately 5,000 acres. Appendix A at A-227; 541 F. 2d at 1296. *Thus, these timber sales represent less than one-half of one percent of the BWCA, and only one percent of its virgin forest.*

4. The BWCA Management Plan

In 1974, the Forest Service issued its Management Plan for the BWCA, and accompanying EIS. The Man-

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[5]Three of the timber sales were held by The Northwest Paper Company. During the course of the litigation, that company merged into Potlatch Corporation.

[6]Two of the timber sale contracts were held by Northern Forest Products, Ltd. During the course of the litigation, the name of that company was changed to Northern Wood Preservers, Ltd.

agement Plan is a land use plan which was intended to establish the overall management policy for the BWCA. As such, the Management Plan dealt with a wide range of subjects, only one of which was timber harvesting.

With respect to timber, the Management Plan continued the no-logging policy in the Interior Zone, the area which receives the bulk of the visitor usage[7], and which contains 69 percent of BWCA's virgin forests[8]. With respect to the Portal Zone, the Management Plan made the following policy determinations. (1) Logging under the *existing* timber sale contracts would continue, subject to modifications recommended by environmental analysis. (2) The making of *future* timber sales would not be barred because the timber to be harvested was "virgin".[9]

However, other policy determinations concerning *future* timber sales to be made were left to the Timber Management Plan which the Forest Service is to prepare for the Superior National Forest, of which the BWCA is a part. These deferred policy determinations include such matters as the number of timber sales to be made in the future, and the criteria for site selection for such future sales, the rate at which logging will occur, and the quantities and species of the timber to be harvested. An EIS will be prepared on that Timber Management Plan, thus assuring an opportunity for judicial scrutiny before any new timber sales are made.

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[7]90 percent of the lake surface in the BWCA is found in the Interior Zone. Some 94 percent of the visitors use the BWCA for water recreation purposes.

[8]The BWCA contains 501,000 acres of virgin forest. Of these, 347,000 acres (69 percent) are found in the Interior Zone.

[9]There is nothing unusual about the logging of "virgin" forest in the BWCA. All logging which has ever occurred in the BWCA has been the logging of "virgin" forests. Appendix at A-231 to A-232; 541 F.2d at 1297-1298.

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH THE DECISION OF THIS COURT IN KLEPPE V. SIERRA CLUB

Petitioner contends that the decision of the Court of Appeals misapplies and conflicts with the decision of this Court in *Kleppe v. Sierra Club*, — U.S. —, 49 L.Ed. 2d 576, 96 S. Ct. 2718, 44 U.S.L.W. 5104 (1976). In that case, the Court recognized that a comprehensive EIS may be required where proposed federal actions will have a "cumulative or synergistic" environmental impact on the area.

Petitioner contends that logging on the existing timber sales, and logging on such timber sales as may be made in the future, are so inter-related as to produce the "cumulative or synergistic" environmental impact which this Court referred to in *Kleppe v. Sierra Club*, supra.

We strongly disagree. The six existing timber sales are separate and distinct logging operations, each with its own prescribed location.[10] The environmental effects of completing the logging on these sales are fully covered in the EIS. The Court of Appeals observed:

> The existing sales are adequately discussed in the EIS. The EIS describes the size, the amount cut, the amount to be cut, the type of timber, the geology, the climate, the soil, the water, the air, the vegetation, the

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[10]Each timber sale has an identifying name. The six existing sales are the Shell Lake Sale, Sunnydale Sale, Jerry Creek Sale, West Tofte Sale, East Tofte Sale, and the Beartrap Sale. The Old Road Sale was not enjoined, and logging thereon has been completed. Appendix at A-227; 541 F.2d at 1295-1296, fns. 7 and 8.

> wildlife, and the scenic and aesthetic qualities with respect to the existing sales. A map of each sale is included in the EIS. Matrix 2 sets forth the physical, biological, cultural and economic impacts which continuing and discontinuing the sales would create. (Appendix at A-249 541 F. 2d at 1305).

It should be noted that the existing timber sales are not new sales. To the contrary, these sales were made during the period from 1959 to 1969.[11] Each of them has a substantial network of logging roads already in place, and in each instance logging had been partially completed before being enjoined.[12] The 5,000 acres remaining to be cut represent only a portion of the acreage originally included in these sales; the rest has already been logged.

The decision in the Management Plan to complete the logging on the existing timber sales is separate and distinct from the decision to make future timber sales. While the Forest Service has made the decision that future timber sales will not be barred because the forest is "virgin", it has reserved to future determination the decisions as to how many such sales would be made, when they would be made, and where they would be located.

This procedure will provide ample opportunity for the consideration of any environmental effect that the completion of the existing timber sales may have on future timber sales. We strongly doubt whether there would be any adverse effect. But in any event, there will be ample opportunity for the consideration of any such effects *before*

[11]See the 1974 Court of Appeals opinion; Appendix A at A-101 to A-102, fn. 8; 498 F.2d at 1317-1318, fn. 8.

[12]The extent of road construction and the amount already logged are described in the District Court's 1973 opinion. Appendix at A-47 to A-56; 358 F. Supp. at 604-609.

any new timber sales are made. No new timber sales will be made until the Timber Management Plan and accompanying EIS have been prepared. The EIS process will afford Petitioner a full opportunity to make its position known. Furthermore, there will be the opportunity for judicial scrutiny of the EIS, thereby assuring Petitioner of a judicial forum in which to present its views, *before* any new timber sales are made.

Whether the separate actions have such a "cumulative or synergistic" environmental effect that their consequences be considered together depends upon the facts of each case. In our opinion, the facts make it clear that there is no such effect in this case. As noted previously, the total acreage to be logged on all six existing timber sales is approximately 5,000 acres, *less than one-half of one percent of the BWCA, and only one percent of its virgin forest.*

The Forest Service has prepared an overall Management Plan for the BWCA, a Plan which dealt with a myriad of management issues. In doing so, the Forest Service elected *not* to burden that Plan with detailed criteria for the making of future timber sales, leaving such matters to the subsequent Timber Management Plan. Whether to proceed in this matter was within the discretion of the Forest Service. Under *Kleppe v. Sierra Club, supra,* the test is whether the Forest Service exercised that discretion arbitrarily. We are convinced that it did not do so.

The decision of the Court of Appeals does not conflict with the decision of this Court in *Kleppe v. Sierra Club, supra.*

II.

THE WILDERNESS ACT ISSUE IS AN EXTREMELY NARROW ONE, APPLYING ONLY TO A SMALL AREA OF NORTHEASTERN MINNESOTA, AND HAVING NO GENERAL OR NATIONAL SIGNIFICANCE; THE COURT OF APPEALS DECIDED THAT ISSUE CORRECTLY

This case does *not* involve any broad or general interpretation of the Wilderness Act of 1964. To the contrary, this case involves the interpretation of the so-called "BWCA Special Provision", a provision which relates only to this limited area of northeastern Minnesota. Consequently, the decision of the Court of Appeals does not have general or national implications.

Petitioner has mounted an elaborate attack on the Court of Appeals decision under the Wilderness Act. In doing so, Petitioner ignores the fact that it is only the "BWCA special provision" which is involved. That section provides:

> *Other provisions of this chapter to the contrary notwithstanding,* the management of the Boundary Waters Canoe Area, . . . shall be in accordance with regulations established by the Secretary of Agriculture in accordance with the general purpose of maintaining, without unnecessary restrictions on other uses, *including that of timber,* the primitive character of the area, particularly in the vicinity of lakes, streams, and portages . . . (emphasis supplied). 16 U.S.C. §1133(d)(5).

The opening clause, "[o]ther provisions of this chapter to the contrary notwithstanding," clearly shows that the BWCA is to be given special treatment under the Wilderness Act.

The Court of Appeals made a painstaking analysis of the administrative history of the BWCA and of the legislative history of the Wilderness Act applicable thereto. That study is detailed in the Appendix to the Court of Appeals opinion. Appendix A at A-256 to A-264; 541 F. 2d at 1308-1311. That study shows that logging of "virgin" timber is an historic practice in the BWCA, a practice which was in active operation at the time the Wilderness Act was enacted.[13] Senator Humphrey, one of the chief sponsors of the Wilderness Act stated repeatedly that the new legislation was not intended to alter existing uses in the BWCA. Similar statements were made by the Chief of the Forest Service. We are convinced that the Court of Appeals placed the proper interpretation on the "BWCA special provision", the only part of the Wilderness Act at issue in this litigation.

In sum, the Wilderness Act issue involved in this case is a very narrow one having no general or national implication. The Court of Appeals decided that issue correctly.

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[13]As the Court of Appeals noted, there were 20 active timber sales in operation in the virgin areas of the BWCA at the time the Wilderness Act was enacted. Appendix at A-232; 541 F. 2d at 1297-1298.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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